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DISTRICT I

May 14, 2014

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You are hereby notified that the Court has entered the following opinion and order:

2013AP1657 State of Wisconsin v. Alexander Murry (L.C. #2004CF3050)

Before Curley, P.J., Kessler and Brennan, JJ.

Alexander Murry, *pro se*, appeals a trial court order denying his postconviction motion brought under WIS. STAT. § 974.06 (2011-12).[1] He also appeals the order denying his motion for reconsideration. The trial court concluded that Murry's claims for postconviction relief are procedurally barred under ***State v. Escalona-Naranjo***, 185 Wis. 2d 168, 517 N.W.2d 157 (1994), and ***State v. Tillman***, 2005 WI App 71, 281 Wis. 2d 157, 696 N.W.2d 574. Based upon our

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm.

In 2004, Murry entered a plea of no contest to homicide by intoxicated use of a motor vehicle. He appealed the judgment of conviction and the order denying postconviction relief. We affirmed the judgment, but we reversed the postconviction order in part and remanded for an evidentiary hearing on Murry's claim that his trial counsel was ineffective for failing to challenge the admissibility of blood alcohol test results. *See* ***State v. Murry***, No. 2005AP3178-CR, unpublished slip op. (WI App Dec. 27, 2006) (***Murry I***). The trial court conducted a hearing in October 2007, and rejected the claim. Murry's appellate counsel next filed an appeal under the no-merit procedures set forth in WIS. STAT. RULE 809.32. Murry failed to respond. We reviewed the record and affirmed, concluding that further proceedings would be frivolous. *See* ***State v. Murry***, No. 2008AP618-CRNM, unpublished op. and order (WI App Mar. 5, 2009) (***Murry II***). The record reveals that Murry did not seek reconsideration from this court, nor did he petition for supreme court review.

In May 2013, Murry filed the postconviction motion underlying this appeal. He now claims that: (1) his arrest was unlawful; (2) he was subjected to an unconstitutional search and seizure; (3) he was deprived of the right to representation by competent counsel; (4) the State unconstitutionally suppressed evidence; (5) the State knowingly used perjured testimony; (6) the judgment is void; and (7) he has newly-discovered evidence that came to light during the evidentiary hearing underlying ***Murry II***. He seeks a new trial.

WISCONSIN STAT. § 974.06 permits criminal defendants to raise constitutional and jurisdictional claims after the time for an appeal has passed. *See* ***State v. Henley***, 2010 WI 97, ¶¶50, 52, 328 Wis. 2d 544, 787 N.W.2d 350. Nonetheless, "[w]e need finality in our litigation." *See* ***Escalona-Naranjo***, 185 Wis. 2d at 185. Therefore, a convicted defendant may not bring postconviction claims under § 974.06 if the defendant could have raised the issues in a previous postconviction motion or on direct appeal unless the defendant states a "sufficient reason" for failing to raise those issues. *See* ***Escalona-Naranjo***, 185 Wis. 2d at 181-82. The rule is fully applicable when, as here, the convicted defendant pursued a direct appeal using the no-merit procedure described in WIS. STAT. RULE 809.32. *See* ***Tillman***, 281 Wis. 2d 157, ¶¶19-20. Whether a defendant's claims are barred by ***Escalona-Naranjo*** in any particular case presents a question of law that this court reviews *de novo*. *See* ***State v. Tolefree***, 209 Wis. 2d 421, 424, 563 N.W.2d 175 (Ct. App. 1997). When the defendant previously pursued an appeal under RULE 809.32, our review of whether subsequent claims are barred includes an assessment of whether appellate counsel and this court followed the no-merit procedure and whether that procedure warrants confidence in the outcome. *See* ***Tillman***, 281 Wis. 2d 157, ¶20.

Murry argues that he has a sufficient reason for serial litigation because, although he acknowledges that he could have raised the issues that he raises now in a response to the no-merit report filed in ***Murry II***, he lacks legal training and has a limited education. He asserts that he therefore relied on his appellate counsel and on this court to identify meritorious issues and cannot be faulted for that reliance. We are not persuaded.

Most litigants lack legal training and rely on their lawyers. Moreover, all litigants in no-merit appeals may anticipate receiving the benefit of this court's independent review. *See* ***Tillman***, 281 Wis. 2d 157, ¶17. The procedural bar of ***Escalona-Naranjo*** would be meaningless

if a prisoner could evade it based on these considerations. Thus, a convicted defendant's decision during the no-merit proceeding to rely on counsel and this court is normally an additional reason to bar serial litigation. "Failure of a defendant to respond to both a no-merit report and the decision on the no-merit report firms up the case for forfeiture of any issue that could have been raised." ***State v. Allen***, 2010 WI 89, ¶72, 328 Wis. 2d 1, 786 N.W.2d 124 (emphasis omitted).

Murry nonetheless claims that his position finds support in a decision by this court, namely, ***State v. Fortier***, 2006 WI App 11, 289 Wis. 2d 179, 709 N.W.2d 893. That case does not apply. The defendant in ***Fortier*** failed to challenge the legality of his sentences during a no-merit proceeding, then later pursued the challenge in a motion under WIS. STAT. § 974.06. *See* ***Fortier***, 289 Wis. 2d 179, ¶15. We concluded that the defendant's reliance on his appellate counsel, coupled with this court's failure to identify an arguably meritorious sentencing issue, constituted a sufficient reason for a second postconviction motion to pursue reduced sentences. *See* ***id.***, ¶¶27-28. As the supreme court explained, however, our holding in ***Fortier*** is limited to circumstances in which a prisoner challenges an illegal sentence:

> In the ***Fortier*** case, the defendant waited more than three and a half years after the decision on the no-merit appeal before filing his § 974.06 motion. Waiting three and a half years before seeking a sentence reduction is one thing; waiting three and a half years before seeking a new trial is quite another. The existence of an arguably meritorious issue does not provide a sufficient reason for waiting many years to raise an issue that could have been raised earlier.

Allen, 328 Wis. 2d 1, ¶73 (citation omitted). Unlike the defendant in ***Fortier***, Murry seeks a new trial. ***Fortier*** therefore has no application here.[2]

Murry suggests that, because one of his current claims is an allegation that he has "newly[-]discovered evidence," he should not be barred from raising that claim now. He acknowledges, however, that the evidence at issue is actually testimony presented during the October 2007 motion hearing underlying ***Murry II***. Murry could have addressed the hearing testimony and its alleged implications in response to the no-merit report that preceded our decision in ***Murry II***. Therefore, he cannot raise his "newly[-]discovered evidence" claim now absent a sufficient reason for failing to do so during the no-merit procedure. *See* ***Tillman***, 281 Wis. 2d 157, ¶19.

Murry also asserts that his current claims are not procedurally barred because, he contends, the trial court lacked jurisdiction and acted in violation of his right to due process. In his view, the judgment of conviction is therefore void and may be challenged "at any time." Murry is wrong.

WISCONSIN STAT. § 974.06 governs both jurisdictional and constitutional claims, and our supreme court squarely holds that those claims are subject to the procedural bar set forth in ***Escalona-Naranjo***. *See* ***Henley***, 328 Wis. 2d 544, ¶54. Accordingly, a prisoner may not pursue such claims absent a "sufficient reason" for failing to raise them in previous litigation. *See*

[2] We neither suggest nor imply that Murry's claims here are arguably meritorious. We merely point out that our decision in ***State v. Fortier***, 2006 WI App 11, 289 Wis. 2d 179, 709 N.W.2d 893, describes a sufficient reason only for a defendant's belated challenge to the legality of a sentence. Because Murry seeks a new trial, his reliance on ***Fortier*** is misplaced, regardless of any merit that his claims may have. *See* ***State v. Allen***, 2010 WI 89, ¶73, 328 Wis. 2d 1, 786 N.W.2d 124.

§ 974.06(4). We have already explained that Murry failed to offer a sufficient reason for not raising his current claims during the proceedings underlying ***Murry II***. The nature of some of those claims does not excuse his failure.

We are satisfied that Murry's current claims are barred. Murry's appellate counsel previously filed a no-merit report that explained why further proceedings would lack arguable merit. Murry did not respond. This court reviewed the record and released a nine-page opinion concluding that pursuit of any issues available to Murry would be frivolous. *See* ***Murry II***, No. 2008AP613-CRNM at 9. Murry does not show that his appellate counsel or this court failed to follow proper no-merit procedure, and he offers no sufficient reason that he failed to raise his current claims while that procedure was underway. We have confidence in the outcome of ***Murry II***. Therefore,

IT IS ORDERED that the orders of the trial court are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals